



NORTH CAROLINA GENERAL ASSEMBLY

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MEMORANDUM

To: Subcommittee on State-Owned Utility Towers

From: Phyllis Pickett
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Committee Staff

Date: April 11, 2010

Subject: State-Owned Utility Towers/Property

This subcommittee was empanelled to review issues related to the use of State-owned utility towers in the installation of facilities necessary to provide high speed broadband service in the State, particularly as to unserved and underserved areas. To facilitate subcommittee discussions, Rep. Kelly Alexander asked committee staff to obtain information on the number and kinds of towers and to review issues related to collocation.

I. Government-Owned Utility Towers

Staff's cursory efforts indicate North Carolina counties and municipalities own approximately 59 utility towers around the State.

The State of North Carolina owns about 54 wireless internet towers. The Highway Patrol owns the vast majority of those towers (39) as part of the Voice Interoperability Plan for Emergency Responders (VIPER). The Department of Transportation is next in the number of towers. The Division of Emergency Management, the Division of Forest Resources, and the NC Forest Service also control towers.

The VIPER towers were built and continue to be built using Department of Homeland Security grant funds since most of the VIPER funding has come from federal grants. Most of these towers are in the central and eastern part of the State, however the majority of the towers remaining to be constructed many of which relate to the budget request are in the western part of the State.

Issues to consider when determining if the towers would be suitable for broadband use include location of the towers, the types of equipment that would need to be placed on these towers or in the buildings for broadband, load capacity issues created by adding additional equipment on the towers and the potential impact on structural reliability, and the costs of maintenance and operations.

II. Collocation

Collocation has been defined as the placement of wireless facilities on existing structures in a manner that negates the need to construct a new, freestanding wireless support structure. In North Carolina, there is not a general or local law specifically providing for, or regulating, the use of government owned utility towers for the purpose of collocation.

III. State Property/Public Purpose Issues

Committee staff reviewed whether the State constitution restricts making State-owned utility towers or other state-owned property available to private entities for the purpose of installing equipment to promote the availability of high speed broadband internet service. The relevant provisions of law are those contained in the N.C. Constitution, Article V, Section 2, subsections (1) and (7), which provide as follows:

"(1) Power of taxation. The power of taxation shall be exercised in a just and equitable manner, for public purposes only, and shall never be surrendered, suspended, or contracted away."

"(7) Contracts. The General Assembly may enact laws whereby the State, any county, city or town, and any other public corporation may contract with and appropriate money to any person, association, or corporation for the accomplishment of public purposes only."

The threshold question is whether State-owned utility towers would be made available for use on terms that implicate either of these provisions. If the taxing power is not exercised, and if the arrangement does not appropriate State money to a private entity, then the "public purpose" requirement of the North Carolina constitution would not apply.

In situations where the "public purpose" requirement applies, the North Carolina Supreme Court has held that the issue of public purpose must be decided on a case by case basis, and no bright line test is to be used. The applicable test for expenditures is two-pronged: 1) the expenditure must involve a reasonable connection with the convenience and necessity of the particular public entity; and 2) the expenditure must benefit the public generally as opposed to special interest or persons. *Maready v. City of Winston-Salem*, 342 N.C. 708 (1996). "Moreover, an expenditure does not lose its public purpose merely because it involves a private actor. Generally, if an act will promote the welfare of a state or a local government and its citizens, it is for a public purpose." *Id.* at 724.

In *Maready*, the Court upheld economic incentives provided to a manufacturer to locate its plant in Forsyth County, finding economic development to be well-established as a proper governmental function, and finding that the local government's purpose to create a more stable local economy by providing displaced workers with continuing employment opportunities, attracting better paying and more highly skilled jobs, enlarging the tax base, and diversifying the economy resulted in a net public benefit that met the public purpose test. Although it is always possible that a constitutional challenge could be made to an arrangement under which public utility towers or other public property is made available to private entities for the purpose of expanding the availability of broadband internet service, it would appear that there is a strong counter argument that encouraging the extension of broadband service to presently unserved or

underserved areas of the State involves a legitimate public purpose and therefore does not violate the North Carolina constitution.